In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-258

ALVIN E. YOUNG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that a new trial should have been granted on the ground that the government failed to take immediate steps to correct a witness's misstatements, despite the fact that the defense rejected a subsequent offer to remedy the error.

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted and sentenced for conspiracy to violate federal narcotics statutes and for various substantive narcotics offenses, in violation of 21 U.S.C. 841, 843(b), and 846, and 18 U.S.C. 2. Petitioners Harold Young and Alvin Young were each sentenced to fifteen years' imprisonment and $20,000 in fines, plus three and five years, respectively, of special parole. Petitioners Harvey Johnson and Charles Harris each received sentences of five years' imprisonment and three years' special parole. The court of appeals affirmed (Pet. App. 13a). A petition for rehearing was denied with three judges dissenting (Pet. App. 27a).

A principal government witness, Linda Johnson, testified at trial that she had met petitioner Alvin Young in April 1972. Thereafter, she and the defendants on several occasions had driven together to New York City to purchase large quantities of heroin. One sale involved the purchase of two kilos of the drug for $72,000. On each occasion, after their return to Philadelphia, the group would meet and adulterate, cut, and package the heroin for sale in small glassine bags. During this period, Linda Johnson served also as a police informant and was paid for this activity (Pet. App. 2a-3a).

On January 2, 1973, Linda Johnson permitted her police "contact" to overhear a telephone conversation she had with petitioner Alvin Young. As a result of the officer's report to his superiors, surveillance was begun which led to the arrest of petitioners and the discovery of 14,000 bags of heroin. In addition to the testimony of Linda Johnson, the government introduced into evidence the heroin, the testimony of various law enforcement agents, and six telephone coversations intercepted pursuant to a court order (Pet. App. 3a-8a).

On cross-examination, Linda Johnson, who had pleaded guilty to several state charges, was asked whether she had received any promises or had reached any agreements or understandings with the federal prosecutors or the police regarding their assistance in the disposition of her state charges. She replied that she had not. On the following day, however, prior to the conclusion of the prosecution's case in chief, the government's counsel advised the court, out of the hearing of the jury, that he and a state prosecutor had urged Linda Johnson to plead guilty to the state charges and had agreed to do anything possible to influence the state court to impose a lenient sentence (Pet. App. 15a-17a).

The prosecution offered to stipulate to the agreement, but this offer was rejected by defense counsel (Pet. 5). The court agreed with defense counsel, stating "I don't think you can expect these defendants to stipulate to something that is a strong point in their favor" (Pet. 5). The court stated that defense counsel would be allowed extra latitude in questioning witnesses. The defense complained that the government's failure to correct Linda Johnson's testimony immediately was "shocking."[1] The court replied that, if the defense was making a motion, that motion was denied (Pet. 6; Pet. App. 17a-18a). The jury was not advised that Linda Johnson's testimony was partially untrue.

Petitioners contend that the failure of the government to correct Linda Johnson's testimony immediately after the misstatement was made entitles them to a new trial, despite the fact that they rejected offers by the government to bring the misstatement to the jury's attention. The court of appeals, in a comprehensive opinion upon which we primarily rely, held that, while the prosecution had an obligation to correct its witness's misleading testimony, the defense waived the error by rejecting the prosecution's offer to correct the misstatement before the jury and by taking no other action to mitigate any damage caused by the error.

The instant case differs materially from *Napue* v. *Illinois*, 360 U.S. 264, upon which petitioners rely, and *Giglio* v. *United States*, 405 U.S. 150. In *Napue*, the prosecution knowingly allowed false testimony to be presented, and

---

[1]Petitioners do not allege here that the witness perjured herself.

only *after* trial revealed the untruth. In *Giglio,* it was not learned until after trial that a principal government witness may have falsely testified that no promises had been made to him. This Court held that the truth was material, and that the jury was entitled to know it.

In the instant case, however, it was the *defense* which prevented the jury from learning the truth, by rejecting the prosecutor's offer to stipulate to the facts and by failing to suggest other means to apprise the jury that a misstatement had been made. The error could easily have been corrected had the defense called Linda Johnson or the Assistant United States Attorney to the stand,[2] or recalled Linda Johnson for further cross-examination.[3] See *United States* v. *Johnson,* 487 F. 2d 1318 (C.A. 5), certiorari denied, No. 73-1418, October 15, 1974. As the court of appeals observed (Pet. App. 23a):

> When error appears in a trial and counsel have opportunity to eradicate it but choose not to do so, they may not unload the burden of the error upon the trial judge. Defense counsel sat by in this case day after day without making the slightest effort to minimize the prejudice of which they now complain. The Government was slow in correcting the testimony of its key witness. Defense counsel, however, in the expectation that any ensuing conviction would be reversed, did nothing to take obvious corrective measures. We do not believe they may now profit from their inactivity and contend on appeal that the defendants are entitled to a new trial.

---

[2]Another defendant did call Taras Wochok, the state prosecutor who, according to the Assistant United States Attorney, had agreed to the arrangement with Linda Johnson. However, Wochock denied under oath that he had agreed to anything (Pet. App. 8a, 18a, n. 7).

[3]In its Opinion sur Petition for Rehearing, the majority rejected the dissenters' interpretation of the trial judge's statement that he would deny a defense motion. As the majority correctly pointed out, the reference was to a motion for mistrial (Pet. App. 27a). It is clear from the district court's offer to the defense of extra latitude in cross-examination and his agreement that they need not accept the prosecutor's proffered stipulation, that the court did not intend to foreclose any remedy.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

DOJ-1974-11